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Decision

Matter of: Marathon Construction Corporation

File: B-284816

Date: May 22, 2000

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Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In procurement for the construction of a berthing wharf for nuclear powered aircraft carriers, protest by offeror that it should have received higher rating for its experience and past performance based on numerous small projects, even though it never successfully completed a project of this magnitude, is denied; agency reasonably concluded that offeror with no comparable large project experience presents higher performance risk than contractor with comparable large project experience.

DECISION

Marathon Construction Corporation, a small business, protests the award of a contract to Nova Group/R.E. Staite, A Joint Venture, under request for proposals (RFP) No. N68711-98-R-5408, issued by the Department of the Navy for the construction of a new berthing wharf for homeporting of nuclear powered aircraft carriers at San Diego, California. Marathon principally argues that the Navy misevaluated proposals by “discounting” its experience and past performance, and that the Navy’s evaluation process discriminated against it as a small business.

We deny the protest.

The RFP, issued August 19, 1999, contemplated a fixed-price contract (with options) for the construction of the berthing wharf. Agency Report (AR), Contracting Officer’s Statement (COS), at 1. The RFP stated that evaluation would be based on best value to the government and that award of the contract would be made based on the proposal determined by the source selection authority (SSA) to be the most

advantageous to the government. AR, encl. 1, RFP § 00202. The RFP contained the following evaluation factors: past performance (with 8 subfactors), technical expertise (15 subfactors), proposed subcontracting effort, and price. The RFP also stated that the price and technical factors were equal in importance. *Id.* With respect to past performance subfactor 1, past performance was to be evaluated based on the construction of new concrete berthing wharves or piers with high voltage power, potable water, steam, sanitary sewer, oily waste, fuel, compressed air, and salt water for deep draft (draft greater than 25 feet) vessels in the last 10 years. Other subfactors also required evaluation of past performance on dredging projects in the last 5 years and past performance of contracts involving the placement of rock dikes and fill, and fill densification in the last 5 years. *Id.*

Concerning technical expertise subfactor 1, prime contract experience and technical expertise in concrete piers/wharves construction, dredging, rock dikes and fill, fill densification, and creation of environmental habitat was to be evaluated. The RFP also separately explained that the technical evaluation under the technical expertise factor would encompass “prior experience and technical expertise in waterfront construction and dredging in Government or comparable civilian projects of the same or similar size, scope and complexity contemplated by this proposed contract.” AR, encl. 1, RFP § 00202.

Five proposals, including Marathon’s and Nova’s, were received by the initial proposal due date of October 4, 1999. AR, COS, at 3. A technical evaluation board (TEB) was tasked with the evaluation and rating of the first 10 subfactors under the technical expertise factor. A source selection board (SSB) rated the proposals under all remaining factors and subfactors (*i.e.*, the remaining technical factors, past performance, proposed subcontracting effort, and price). The SSB report, contained in the Pre-Negotiation Business Clearance Memorandum, included excerpts from the TEB’s written report indicating items identified for discussions. All proposals were found to be unacceptable but susceptible of being made acceptable. *Id.* The SSB recommended that discussions be held with all offerors.

On November 30, the agency sent out its first discussion letters to offerors. The letter to Marathon concerning the past performance factor stated that “[n]one of the projects submitted by Marathon appear to be of the size, complexity of scope, and associated dredging amounts required by the solicitation.” AR, encl. 7, at 3. Marathon responded in its revised proposal as follows:

Although Marathon has not been awarded a project with the exact scope and dollar amount of [this] contract . . . [w]e believe our project team is certainly qualified for the construction of [this] Berthing Wharf Project since we have self-performed every major portion of [this] contract under other contracts, including the construction of wharves and piers, construction of environmental habitats, dredging,

construction of fill projects, soil densification, and the construction of rock dikes.

AR, encl. 4, Revised Proposal, Dec. 7, 1999, at 1.A.i. Marathon also explained that its predecessor company had performed a pier construction project for \$25 million dollars in 1981 and that some of the former principals still worked for Marathon. Id.

The contracting officer sent out three more rounds of discussion letters to the offerors. On December 14, the agency received and reviewed revised offers. Final revised proposals (FRP) were received by December 20, AR, COS, at 3, and the agency proceeded to evaluate them. Under past performance subfactor 1 (requiring evaluation of past construction of new concrete berthing wharves or piers with high voltage power, and associated items for deep draft vessels in the last 10 years), the agency found that none of Marathon's projects were of the magnitude and complexity of the current procurement and did not satisfy the requirements of this evaluation subfactor. AR, encl. 13, Post-Negotiation Business Clearance Memorandum, at 17. The agency therefore assigned the proposal a rating of "NR" (Not Rated) for this subfactor in accordance with the solicitation, which stated that if an offeror does not "have a past performance history relating to this solicitation, the offeror will not be evaluated favorably or unfavorably on this factor." AR, encl. 1, RFP § 00202. Nevertheless, Marathon's proposal was rated acceptable for the past performance factor as a whole, with all subfactors evaluated.

In contrast, Nova, as explained below, was found to have extensive and excellent past performance, and had recently completed a virtually identical nuclear carrier berthing wharf in San Diego at the same base. Nova had received an outstanding evaluation for its performance of that construction project. AR, COS, at 4. Consequently, Nova received a highly acceptable rating for the past performance factor as a whole.

With respect to technical expertise subfactor 1 (prime experience and technical expertise), the TEB made similar findings. The TEB found that Marathon did not appear to have any recent experience in new pier and wharf construction projects similar in size and complexity to the current project, AR, encl. 5, at 20-21; COS, at 6, and that Marathon's experience was generally limited to repair and rehabilitation of existing facilities, not construction of new facilities on an undeveloped site. The firm's most recent projects involved less than \$5 million in construction costs and were constructed for smaller vessels. AR, encl. 5, at 20-21. Similarly, the TEB found that the firm's experience in dredging was limited to small jobs, which were below the scope and complexity of the current project. AR, encl. 5, at 21. Finally, the TEB found that Marathon had limited experience in rock dikes, fill, and fill densification, having completed only one recent project. Id. Nevertheless, while receiving an unsatisfactory but susceptible of being made acceptable rating for this subfactor, Marathon's proposal was rated acceptable for the factor as a whole, with all subfactors evaluated.

In contrast, the TEB found that Nova had recent experience in concrete pier and wharf construction, including the new aircraft carrier wharf at the same site in San Diego. AR, encl. 5, at 1. All listed projects were found to be “notably comparable” to the current project, as they accommodated deep draft vessels, provided identical berthing utilities, and were of a similar dollar value. Id. The TEB noted that the aircraft carrier wharf recently constructed in San Diego was the project on which the current project’s design was based, making it the “most similar” in size and complexity to the current procurement. The firm was also found to possess recent experience in the administration of dredging projects “similar in size and complexity” to the current project. Id. The firm also had the required experience in rock dike construction and fill and fill densification, as well as the creation of environmental habitats.

With respect to price, Marathon proposed [deleted], and Nova \$42,772,800.¹ (The government estimate for the project was [deleted].) The SSB, considering the TEB’s and its own findings, recommended award to Nova as the best value. AR, encl. 13, Post-Negotiation Business Clearance Memorandum, at 32-33. The SSB found that Nova submitted the highest-rated proposal and that, under technical expertise, Nova had the greatest experience of any offeror. The SSB concluded that Nova’s strength in its experience offered little or no performance risk, and, therefore, warranted the payment of its higher price. Id. The SSA agreed with and adopted the findings of the TEB and SSB and selected Nova for award. After a debriefing, this protest followed. Performance has not been stayed due to the critical operational needs of the Navy’s aircraft carriers.

Marathon challenges the award on several grounds. We have reviewed all of Marathon’s arguments and, based on our assessment of the record, find that they are without merit. We address Marathon’s principal arguments below.

Marathon argues that the Navy improperly discounted its experience and past performance. It contends that there was no rational basis to conclude that Nova’s recent experience and past performance constructing a berthing wharf of similar size, scope, and complexity made the firm more qualified to perform this contract than Marathon, which has equivalent experience and past performance in the individual construction elements that make up this project. Protest at 14. This experience in individual smaller construction elements, according to Marathon,

¹ The percentage difference in price is [deleted] percent with all options considered and [deleted] percent when only the awarded options are considered. While the protester argues that the [deleted] percent differential should have been used by the agency for the tradeoff decision, the RFP required the evaluation of all options. AR, encl. 1, RFP § 1.15. Moreover, the unawarded options, under the terms of the RFP, could be exercised by the agency at a later date.

shows capability to successfully complete this project, “which [itself] is simply a combination of various straightforward, smaller construction projects.” Id. at 15.

The determination of the relative merits of proposals is primarily a matter of agency discretion, which our Office will not disturb unless it is shown to be unreasonable or inconsistent with the stated evaluation criteria. Systems & Processes Eng’g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441 at 5. In a negotiated procurement, the government is not required to make award to the firm offering the lowest price unless the RFP specifies that price will be the determinative factor. University of Kansas Med. Ctr., B-278400, Jan. 26, 1998, 98-1 CPD ¶ 120 at 6. Thus, as here, in the absence of such an express provision, the procuring agency retains the discretion to select a higher-priced, but also technically higher-rated, proposal if doing so is in the government’s best interest and is consistent with the solicitation’s stated evaluation and source selection scheme. Id.

We reject Marathon’s arguments. The RFP clearly stated that past performance, experience, and technical expertise in concrete piers/wharves construction, dredging, rock dikes and fill, fill densification, and creation of environmental habitat would be evaluated. The RFP further stated that these tasks would be evaluated for “Government or comparable civilian projects of the same or similar size, scope and complexity contemplated by this proposed contract . . . in terms of extent of experience as well as relative size and complexity of past projects.” It therefore was appropriate--and should have come as no surprise to Marathon--for the evaluators to consider whether the past projects referenced in its proposal were comparable in size, complexity and value to the project being awarded. As previously stated, Marathon’s experience reflected projects that involved primarily repair or rehabilitation of waterfront facilities, rather than new construction. In addition, the largest projects identified by Marathon in its proposal were, for the most part, a third to a quarter of the dollar value of the current project. AR, COS, at 6. The largest dollar value of any single project listed by Marathon and performed in the last 10 years was approximately \$14 to \$15 million, as compared to the contract award amount of more than \$40 million.² Id.

In light of the evaluation scheme, it was reasonable for the Navy to give a more favorable risk rating to Nova than to Marathon, based on its having successfully

² We also agree with the Navy that the \$25 million project Marathon’s predecessor company performed almost 20 years ago was properly disregarded because it was outdated under any fair reading of the solicitation. See AR, encl. 1, RFP § 00202 (construction past performance--10 years; dredging projects--5 years; subcontractors’ past performance--5 years). In light of the specific time references in the RFP, furthermore, we reject the protester’s argument that the agency’s consideration of only “recent” projects during its evaluation constituted a new, undisclosed evaluation criterion.

performed more relevant contracts. See, e.g., Browning Ferris Indus. of Hawaii, Inc., B-281285, Jan. 21, 1999, 99-1 CPD ¶ 35 at 6; Ogden Support Servs., Inc., B-270012.4, Oct. 3, 1996, 96-2 CPD ¶ 137 at 3. While Marathon may have performed smaller projects that encompassed the elements of the larger project involved here, its arguments ignore the fact that combining numerous elements into a single large project may introduce performance challenges and risks not present in smaller scale projects; the RFP's focus on the size, scope and complexity of past projects reflects the agency's concern in this regard. In any event, Marathon's position that experience with similar elements of work on smaller individual projects should warrant a higher evaluation rating is inconsistent with the solicitation's evaluation criteria which, again, emphasized size, scope and complexity of prior similar contracts. If Marathon believed the evaluation criteria to be unduly restrictive, it should have raised the argument prior to the date for submission of proposals. To the extent that Marathon challenges the agency's application of those criteria now, after contract award, the challenge is untimely. 4 C.F.R. § 21.2(a)(1) (2000).

Marathon also argues that the discussions with the firm were not meaningful. Marathon states that the agency's November 30, 1999 discussion letter (to the effect that none of the projects submitted by Marathon appeared to be the same size and scope of the current project) referred to the past performance factor, not the experience factor. Marathon notes that none of the subsequent letters repeated the deficiency with respect to experience or past performance, and that the letters stated that its proposal was acceptable unless a deficiency was expressly listed. These arguments are untimely. Marathon knew or should have known no later than at the time of the debriefing that its lack of relevant experience had been the determining factor in the award decision. For example, it was told at the debriefing that it had received an unacceptable but susceptible of being made acceptable rating for the experience criterion. Marathon also had in its possession the discussion letters. Therefore, if Marathon believed discussions in this area were inadequate, it should have protested this matter no later than 10 calendar days after the debriefing. However, in its protest, Marathon did not argue this alleged discrepancy between the past performance and experience factors in the context of discussion letters; Marathon did not raise this issue until it filed its comments on the agency report. 4 C.F.R. § 21.2(a)(2). In any event, Marathon's argument ignores the substance of the agency's letter, which clearly put Marathon on notice that none of its projects appeared to be of the size, complexity of scope, and associated dredging amounts required by the solicitation. Given the solicitation evaluation criteria for past performance and experience, the notice provided had obvious relevance for both.

Marathon states that the Navy effectively rejected Marathon's proposal on a pass/fail basis, that this essentially constituted a finding of nonresponsibility, and that this finding should have been referred to the Small Business Administration (SBA) for a certificate of competency (COC) review. This argument is without merit. Traditional responsibility factors, such as experience, may be used for the comparative evaluation of proposals in relevant areas; where a proposal is

determined to be deficient pursuant to such an evaluation, the matter is one of relative technical merit, not responsibility, and does not require a referral to the SBA. See Advanced Resources Int'l, Inc.--Recon., B-249679.2, Apr. 29, 1993, 93-1 CPD ¶ 348 at 2.³

The protest is denied.

Comptroller General
of the United States

³ Marathon also maintains that the Navy harbored some bias against Marathon, or small business in general, that influenced its selection decision (Nova is a large business). This accusation is unsupported. Government officials are presumed to act in good faith and where a protester argues otherwise it must provide convincing proof since our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Oceanometrics, Inc., B-278647.2, June 9, 1998, 98-1 CPD ¶ 159 at 6. Marathon has offered nothing but bare assertion.